Supreme Court, U.S.
FILED
FEB 23 1995
CLERK OF THE COURT

(2)

No. 94-1096

In The

Supreme Court of the United States

October Term, 1994

AMERICAN REPUBLIC INSURANCE COMPANY,

Petitioner,

v.

SUPERINTENDENT OF INSURANCE
OF THE STATE OF MAINE,

Respondent.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did a former Maine insurance statute that limited health insurance exclusions for preexisting conditions violate the contract clause of the United States Constitution as applied to guaranteed renewable contracts of an insurance company that was entitled to seek a rate increase to offset any increased costs resulting from the statute?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Superintendent of Insurance of the State of Maine ("Superintendent"), respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the opinion of the Maine Supreme Judicial Court, sitting as the Law Court ("Law Court"), issued on September 21, 1994, reproduced in the Appendix to the Petition for a Writ of Certiorari ("App.") at App. 1-8, and reported in *American Republic Insurance Co. v. Superintendent of Insurance*, 647 A.2d 1195 (Me. 1994).

STATEMENT OF THE CASE

The petitioner, American Republic Insurance Company ("American Republic"), contends that application of a former Maine insurance statute to American Republic's guaranteed renewable contracts issued prior to, but renewed after, the effective date of the statute, violates the contract clause of the United States Constitution. U.S. Const. art I, § 10. Specifically, American Republic alleges that the Maine Supreme Judicial Court correctly cited, but "misapplie[d]," the legal principles from the leading authorities of this Court to the allegedly "unique" facts concerning American Republic's insurance contracts. *See* Petition for a Writ of Certiorari ("Petition") at 5, 8. We briefly recapitulate the salient facts.

American Republic is an Iowa corporation registered to do business and licensed to sell insurance in Maine. Until December 1, 1993, when it informed the Bureau of Insurance that it was no longer selling health insurance in Maine, American Republic issued individual medical

insurance policies guaranteed to be renewable for the life of the insured provided that the premiums were timely paid. The policies provided that the benefits may not be changed without the consent of the insured, and also provided that "the company may increase rates in the future." App. 18.

In the past, American Republic "routinely" excluded specified preexisting conditions from coverage in its guaranteed renewable insurance policies. App. 2. In its state court complaint, American Republic asserted that 432 of its policies issued in Maine in 1990 contained such exclusions. App. 29. In its petition, American Republic now asserts that 560 of its policies issued in Maine in 1990 contained such exclusions. Petition at 4. The record does not indicate how many of these policies continue in force today.

In 1990, the Legislature enacted the Continuity of Health Insurance Coverage Act. Me. Laws 1989, ch. 867, §§ 8-10 (enacting Me. Rev. Stat. Ann., tit. 24-A, §§ 2848-2850, 4210-A) (reprinted in App. 33-46). American Republic challenges the constitutionality of section 2850(2), which prohibited insurers from including in individual health insurance policies,

> a preexisting condition exclusion period of more than 6 months, except that the policy may exclude coverage for up to 24 months for any preexisting condition that, as of the date of the coverage, requires ongoing medical observation or treatment.

Me. Laws 1989, ch. 867, § 8. Section 2850(2) applied to all individual health insurance policies "executed, delivered, issued for delivery, or renewed" in Maine on or after

December 1, 1990. Me. Laws 1989, ch. 867, § 10. A policy was deemed to be renewed no later than the next yearly anniversary of the contract date. *Id.*

In 1993, the Maine Insurance Code was substantially amended in numerous respects. *See, e.g.*, Petition at 20 n.8. The Maine Supreme Judicial Court noted that, as part of that major revision, section 2850(2) was "significantly amended." App. 2-3 n.2; *see* Me. Laws 1993, ch. 477, § A-15. American Republic's challenge, therefore, concerns the constitutionality of section 2850(2) in effect between December 1, 1990, and December 1, 1993.

In an effort to suggest that American Republic was singled out for unfair and unconstitutional treatment, American Republic asserts that it is (or, more accurately, was) the only insurer to offer such guaranteed renewable insurance policies in Maine and thus was uniquely and severely affected by the challenged statute. *See* Petition at 4, 5, 16, 17. The record, however, is silent on the number of insurance companies offering guaranteed renewable insurance policies in Maine. Rather, the evidence suggests that, on a nationwide basis, guaranteed renewable insurance policies, which were once quite prevalent, now occupy only a small niche of the insurance market. For example, in a *Consumer Reports* article that was admitted into evidence during the administrative hearing and provided "helpful background" to the Superintendent, App. 21, three of 40 insurance companies surveyed still offer guaranteed renewable insurance policies.

In any event, it bears emphasis that the challenged statute is not targeted at or specifically limited to guaranteed renewable policies. Rather, the statute by its terms

applied to all insurance companies selling individual health insurance policies in Maine. Furthermore, it is undisputed that the challenged statute was not directed at American Republic. For nearly a year after section 2850(2) was enacted, neither the Bureau of Insurance nor American Republic was aware that the statute applied to American Republic's guaranteed renewable insurance policies. *See, e.g.*, Petition at 6.

In September 1991, after his wife's insurer removed a preexisting condition exclusion from her health insurance policy and American Republic refused to remove a preexisting condition exclusion from his health insurance policy, Herbert Wentworth filed a consumer complaint with the Bureau of Insurance. App. 16. American Republic had excluded coverage for cataracts when it issued Wentworth's policy in June 1988 following Wentworth's disclosure that his doctor had observed cataracts developing in 1987. *Id.* The Bureau of Insurance directed American Republic to remove the exclusion. *Id.*

American Republic then sought a hearing before the Superintendent on its request for an exception from section 2850(2) for its guaranteed renewable insurance policies. Following an adjudicatory hearing, the Superintendent denied American Republic's request and held, *inter alia*, that the statute did not constitute an unconstitutional impairment of contracts under the Maine or United States Constitutions. App. 15-26.

As part of his analysis, the Superintendent found that:

> American Republic may file for rate increases adequate to offset the losses that may be

> incurred by removal of preexisting condition exclusions in existence prior to enactment of Section 2850.
>
> Herbert Wentworth's guaranteed renewable health insurance policy provides that the company may increase rates in the future.

App. 17-18.

The Superintendent held further that if American Republic filed a request for a rate increase, under Maine law, the amended rates would be approved for use within 60 days "unless the filed rates are 'excessive, inadequate or unfairly discriminatory' or unless the filing in some other way violates the law[.]" App. 23 (quoting Me. Rev. Stat. Ann., tit. 24-A, § 2736). Also, prior to disapproval of a proposed rate increase, the insurance company could request that an adjudicatory hearing be held pursuant to the Maine Administrative Procedure Act, and the aggrieved insurance company could then appeal the denial to state court. *See* Me. Rev. Stat. Ann., tit. 24-A, § 2736-A; Me. Rev. Stat. Ann., tit. 5, § 9051, *et seq.*

Although American Republic now blandly asserts that the Superintendent "declined to approve" its request for a rate increase, *see* Petition at 5, this alleged fact is not contained in the record. Moreover, the actual facts tell a different tale. After American Republic became aware in 1991 that section 2850(2) applied to its guaranteed renewable insurance policies, it did not request a rate increase. Rather, as noted above, American Republic requested an exemption from section 2850(2) for its guaranteed renewable insurance policies. Following the adjudicatory hearing, American Republic still did not request a rate increase, but instead submitted a memorandum dated

May 27, 1992, asserting that removal of all of the preexisting condition exclusions could lead to a 25% increase in premiums for all of its guaranteed renewable policies then in force in Maine. Neither the Superintendent nor the later reviewing courts mentioned, much less accepted, the conclusions in this post-hearing memorandum.

On September 30, 1992, American Republic submitted for the first time a proposed rate increase. American Republic did not seek – and has never sought – a premium increase for all of its guaranteed renewable policies in Maine. Instead, American Republic sought a 144% increase applicable only to guaranteed renewable policies that previously had contained preexisting condition exclusions. In several subsequent letters, the Bureau of Insurance informed American Republic that it could not approve the proposed rate increase in its entirety without additional information. In a letter dated March 10, 1993, the Bureau of Insurance sought additional information, but nevertheless indicated that a 15% premium increase could be approved even without additional information. American Republic did not respond to this letter.

Thus, on April 29, 1994, American Republic was notified that:

> We have received no response to my letter of March 10, 1993. If we do not hear from you within 30 days, we will assume you are no longer interested in pursuing this filing.

American Republic did not respond to this letter. In sum, American Republic did not seek an offsetting rate increase for nearly two years after the challenged statute

took effect, and then, although American Republic asserts that it was "uniquely and severely" affected by the statute, Petition at 5, it did not accept the offer of a partial rate increase, but simply abandoned its request altogether.

Meanwhile, on July 23, 1992, following an adjudicatory hearing, the Superintendent rejected American Republic's constitutional claim and denied its request for an exemption from section 2850(2) for American Republic's guaranteed renewable health insurance policies. App. 15-26. On August 25, 1992, American Republic filed its complaint in the Maine Superior Court (Kennebec County). App. 27-32. Based on the administrative record, the lower court vacated the Superintendent's decision and held that section 2850(2) constituted an unconstitutional impairment of contracts under the Maine and United States Constitutions as applied to American Republic's guaranteed renewable health insurance policies. App. 9-14.

The Superintendent then appealed to the Maine Supreme Judicial Court. On September 21, 1994, the Supreme Judicial Court applied the three-part test announced by the Court in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983), vacated the lower court's ruling, and held that section 2850(2) did not constitute an unconstitutional impairment of contracts under the Maine or United States Constitutions as applied to American Republic's guaranteed renewable health insurance policies. *American Republic Insurance Co. v. Superintendent of Insurance*, 647 A.2d 1195 (Me. 1994); App. 1-8.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE IT DOES NOT SATISFY THE STANDARDS GOVERNING REVIEW ON CERTIORARI.

American Republic does not identify the "special and important" reasons under Supreme Court Rule 10 for granting its petition for a writ of certiorari. Properly parsed, it is apparent that American Republic seeks review of a decision of limited precedential value solely because it believes that the Maine Supreme Judicial Court reached the wrong conclusion in applying the governing legal principles from *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983), to the facts of this case. We consider in turn each of the provisions of Supreme Court Rule 10.

First, American Republic does not suggest that the decision below conflicts with any decision from any court of appeals. *See* Sup. Ct. R. 10.1(b). In fact, American Republic does not even cite any decision from any court of appeals in its petition.

Second, American Republic does not assert that the decision below conflicts with any decision from any another state court of last resort. *Id.* Rather, American Republic merely asserts that there is a "*division* among the lower courts on the specific issue of whether an impermissible impairment occurs when an insurer is forced to undertake an obligation beyond that to which it had agreed by contract." Petition at 11 (emphasis added and collecting cases). This "division" among state courts in five cases decided during the last 15 years reflects only differing outcomes based only on differing fact patterns

and differing legal standards in place at the time, and certainly does not constitute a "conflict" that necessitates resolution by this Court.

In three of the five cited cases, including the only one of the five cited cases that was decided after and applied the three-part test of *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983), the state courts rejected the insurance company's contract clause claims. *See Calfarm Insurance Co. v. Deukmejian*, 48 Cal.3d 805, 258 Cal.Rptr. 161, 771 P.2d 1247 (1987) (applying *Energy Reserves Group*); *Reserve Life Insurance Co. v. LaFollette*, 108 Wis.2d 637, 323 N.W.2d 173 (App. 1982); *American Manufacturers Mutual Insurance Co. v. Commissioner of Insurance*, 374 Mass. 181, 372 N.E.2d 520 (1978). Furthermore, although not cited by American Republic, other state court decisions that were decided after and applied the three-part test of *Energy Reserves Group* have also rejected contract clause claims asserted by insurance companies. *See, e.g., State Farm Mutual Insurance Co. v. State*, 124 N.J. 32, 590 A.2d 191 (1991); *Blue Cross and Blue Shield of Michigan v. Milliken*, 422 Mich. 1, 367 N.W.2d 1, *appeal dismissed*, 474 U.S. 805 (1985). In other words, most state courts, and more importantly, those state courts that have applied the three-part test of *Energy Reserves Group*, have rejected contract clause claims asserted by insurance companies.

While American Republic has cited two cases in which an impairment of contract was found (*see* Petition at 11), both are factually and legally distinguishable from the instant case. The first of these cases is *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987) (*per curiam*), a decision which, as the California Supreme Court has

observed, "offers something for both sides." *Calfarm Insurance Co. v. Deukmejian*, 48 Cal.3d at 829, 258 Cal.Rptr. at 175-76, 771 P.2d at 1261.

> Florida passed a law which limited non-economic tort damages, froze insurance rates, required a partial rebate of premiums on existing policies, and prohibited insurers from canceling or refusing to renew existing policies in order to avoid the rate freeze or rebate. The court held the rebate unconstitutional, applying a Florida rule that "virtually no degree of contract impairment is tolerable in this state." But it upheld without discussion all other provisions relating to insurance policies, including the section limiting the insurers' right to refuse to renew policies.

Id. Accordingly, *Smith* is factually distinguishable from and is not even in conflict with the instant case.

More importantly, the Florida Supreme Court in *Smith* did not cite or apply any decision from this Court, much less the three-part test of *Energy Reserves Group*, and for that matter, did not even cite or apply the contract clause of the United States Constitution. *See Smith v. Department of Insurance*, 507 So.2d at 1094-95. In fact, the *Smith* court relied exclusively on earlier Florida state decisions, which, in turn, cited decisions from this Court as persuasive authority in interpreting the contract clause of the *Florida* Constitution. *See United States Fidelity and Guaranty Co. v. Department of Insurance*, 453 So.2d 1355, 1360-61 (Fla. 1984); *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774, 779-80 (Fla. 1979). It is, of course, immaterial whether there is an alleged conflict

between the contract clauses of the Florida and the United States Constitutions.

This leaves *Health Insurance Association of America v. Harnett*, 44 N.Y.2d 302, 405 N.Y.S.2d 634, 376 N.E.2d 1280 (1978), in which the New York Court of Appeals summarily held following a single page of analysis that requiring insurance companies to include maternity benefits in newly issued or renewed health insurance policies constituted an impairment of contracts. 44 N.Y.2d at 313-14, 405 N.Y.S.2d at 641, 376 N.E.2d at 1287. This case has been summarily distinguished by subsequent state courts in New York and elsewhere on the ground that it predates (and thus could not apply) the relevant decisions from this Court, on the ground that it rests on an excessively crabbed view of state power under New York law, and on the ground that it is factually inapposite. *See Reserve Life Insurance Co. v. LaFollette*, 323 N.W.2d at 178; *Calfarm Insurance Co. v. Deukmejian*, 48 Cal.3d at 830 n.25, 258 Cal.Rptr. at 176 n.25, 771 P.2d at 1262 n.25; *First United American Life Insurance Co. v. Curiale*, 200 App.Div.2d 243, 613 N.Y.S.2d 494 (1994). In sum, American Republic does not contend – and could not contend – that the decision below conflicts with any decision from either a federal court of appeals or a state court of last resort.

Third, American Republic does not assert that the decision below "has decided an important question of law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(c). Although American Republic laments the fact that none of this Court's recent contract clause decisions involved insurance contracts, *see* Petition at 11, American Republic does not suggest that a different

legal standard would apply. On the contrary, American Republic elsewhere suggests that insurance contracts are similar to pension contracts that were the subject of this Court's decision in *Allied Structural Steel Co. v. Spannus*, 438 U.S. 234 (1978). *See* Petition at 13-14. Suffice to say, applying a well-established constitutional standard to a different fact pattern is not an unsettled and important question of law that should be resolved by this Court.

This brings us to the only remaining ground upon which American Republic apparently is seeking review of the decision below on a writ of certiorari, namely, that the Maine Supreme Judicial Court decided the contract clause question in a way that conflicts with the applicable decisions of this Court. Sup. Ct. R. 10.1(c). As an initial matter, it should be noted that American Republic's principal reliance in its petition is not upon this Court's most recent contract clause decisions, but rather upon *Allied Structural Steel Co. v. Spannus*, 438 U.S. 234 (1978), which is cited on virtually every page of American Republic's petition. American Republic nevertheless recognizes that subsequent decisions from this Court have eroded the continuing validity of *Allied Structural Steel*, and indeed, "one noted scholar" has suggested that this decision has been "effectively overruled." *See* Petition at 10-11 & n.5, citing L. Tribe, *Constitutional Law*, § 9-11 at 619-28 (2d ed. 1988). This Court certainly should not review the decision below to determine whether it conflicts with a decision of this Court that may, or may not, still be good law.

Moreover, since the Maine Supreme Judicial Court expressly applied this Court's three-part *Energy Reserves Group* test that was articulated after *Allied Structural Steel* was decided, American Republic's petition is necessarily

limited to the claim that the Maine Court "misapplie[d]" the legal standard to the particular facts of this case. *See* Petition at 8. "It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice*, § 4.17 at 193 (7th ed. 1993) (footnote omitted). This admonition is particularly apt in this case given the limited precedential effect of the decision below.

It bears repeating that American Republic asserts that the challenged statute "uniquely" affected only American Republic, *see* Petition at 4, 5, 16, 17, and, as the Maine Supreme Judicial Court noted, the challenged statute has since been "significantly amended." App. 2-3 n.2. Since it is undisputed that the challenged statute applied to all individual health insurance policies issued or renewed on or after December 1, 1990, *see* Me. Laws 1989, ch. 867, § 10, and was not directed at American Republic, *see* Petition at 6, this case is scarcely a "particular injustice" that should be corrected by this Court. *See* Petition at 10.

In any event, the fundamental, albeit implicit, premise of American Republic's petition is unsound – the Maine Supreme Judicial Court did not misapply this Court's three-part *Energy Reserves Group* test in rejecting American Republic's contract clause claim. We now turn to that claim.

II. THE MAINE SUPREME JUDICIAL COURT PROPERLY APPLIED THIS COURT'S THREE-PART *ENERGY RESOURCES GROUP* TEST IN REJECTING THE PETITIONER'S CONTRACT CLAUSE CLAIM.

In evaluating American Republic's contract clause claim, the Maine Supreme Judicial Court expressly quoted and applied this Court's three-part *Energy Reserves Group* test:

> In order to determine if the application of a statute results in an unconstitutional impairment of a contract, the Supreme Court has developed a three-part test. The threshold question is whether the law "operate[s] as a substantial impairment of a contractual relationship." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) (quoting *Allied Structural Steel Co. v. Spannus*, 438 U.S. 234, 244 (1978)). If so, the State must have "a significant and legitimate public purpose" for the regulation, such as remedying a broad, general social problem. *Id.* at 411-12. In addition, the adjustment of the contracting parties' rights and responsibilities that results from the new law must be based on reasonable conditions and "of a character appropriate" to the purpose that justified its adoption. *Id.* at 412 (quoting *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977)).

App. 4. We consider *seriatim* American Republic's contention that the Maine Supreme Judicial Court misapplied each part of the *Energy Reserves Group* test.

A. American Republic Has No Grounds To Complain That The Maine Supreme Judicial Court Made The Assumption In American Republic's Favor That The Challenged Statute Constituted A Substantial Impairment.

The Maine Supreme Judicial Court expressly considered the standard articulated in this Court's most recent contract clause decision, *General Motors Corp. v. Romein*, 112 S.Ct. 1105, 1109-10 (1992) (cited in App. 5), and "assume[d] without deciding that in the case of American Republic's guaranteed renewable contracts the impairment is substantial." App. 5. American Republic contends, however, that the Maine Supreme Judicial Court erred in making this assumption. *See* Petition at 12-14.

It is difficult to fathom American Republic's suggestion that this Court should review the Maine Supreme Judicial Court's allegedly erroneous assumption that American Republic was *correct* in its assertion that the alleged impairment is substantial. Moreover, since the challenged statute easily passes muster under the remaining portions of the *Energy Reserves Group* test, there was nothing erroneous in the Maine Supreme Judicial Court's decision to assume without deciding that the alleged impairment was substantial. On the contrary, this Court has made plain that courts may properly make assumptions about the level of the impairment if the challenged statute otherwise meets the *Energy Reserves Group* requirements:

> These inquiries are both essential to determining the "severity of the impairment," which, in turn affects "the level of scrutiny to which the legislation will be affected." *Energy Reserves*

> *Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). While these dearths in the record might be critical in some cases, they are not essential to our discussion here because the Subsistence Act withstands scrutiny even if it is assumed that it constitutes a total impairment.

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 504 n.31 (1987).

B. In Fact, The Challenged Statute Did Not Constitute A Substantial Impairment Of The Petitioner's Contractual Obligations.

Although the Maine Supreme Judicial Court properly could assume without deciding that the alleged contractual impairment was substantial, this Court, of course, need not make such an assumption. In fact, applying this Court's well-established standards, it is readily apparent that the alleged contractual impairment was, at best, minimal.

In assessing the substantiality of the alleged impairment, "[s]ignificant here is the fact that the parties are operating in a heavily regulated industry." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. at 413 (footnote omitted and citing *Veix v. Sixth Ward Building & Loan Association*, 310 U.S. 32, 38 (1940)); *see also Exxon Corp. v. Eagerton*, 462 U.S. 176, 194 n.14 (1983) (same). In heavily regulated industries, the contract clause does not insulate a party from state regulation because, as Justice Holmes observed in an often quoted passage, "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power

of the State by making a contract about them." *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908).

It is beyond dispute that insurance is one of the most heavily regulated enterprises in this country. Over 50 years ago, Justice Frankfurter observed:

> Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissitudes of life have long been withdrawn from the benefits and caprices of free competition. The state may fix insurance rates; it may regulate the compensation of agents; it may curtail drastically the area of free contract.

Osborn v. Ozlin, 310 U.S. 53, 65-66 (1940) (citations omitted); *see also California Automobile Association v. Mahoney*, 341 U.S. 105, 109-10 & n.2 (1951) (collecting cases).

The level of regulation of insurance certainly has not decreased in the last 50 years. On the contrary, numerous changes that directly prescribe the scope and nature of health insurance coverage have been enacted during the last 20 years.[1] Indeed, in its brief filed with the Superintendent in the adjudicatory proceeding, American Republic agreed with the many courts that have found the

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[1] *See, e.g.*, Me. Laws 1975, ch. 276, § 2 (codified at Me. Rev. Stat. Ann., tit. 24-A, § 2741) (extending maternity coverage to unmarried women); Me. Laws 1975, ch. 276, § 2 (codified at Me. Rev. Stat. Ann., tit. 24-A, § 2742) (extending child coverage to unmarried women); Me. Laws 1975, ch. 770, §§ 102, 104 (codified at Me. Rev. Stat. Ann., tit. 24-A, § 2743) (extending coverage for newborn children); Me. Laws 1975, ch. 345, § 2 (codified at Me. Rev. Stat. Ann., tit. 24-A, § 2437) (extending coverage for dentists); Me. Laws 1977, ch. 470, § 2 (codified at Me. Rev. Stat. Ann., tit. 24-A, § 2745) (extending coverage for home health care); Me. Laws 1983, ch. 546, § 2 (codified at Me. Rev. Stat.

insurance industry to be heavily regulated and thus subject to change, when it candidly acknowledged that:

> It goes without saying that insurance is among the most heavily regulated of industries and that, as a result, expectations that a particular contract form will not be changed by regulation are low.

Brief for American Republic, dated May 5, 1992, at 8.

Furthermore, in considering the substantiality of the alleged impairment, the Court could have been describing this case when it observed that:

> the contracts expressly recognize the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law.

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. at 416 (footnote omitted). This case, therefore, has little in common with the principal authority relied upon by American Republic, *Allied Structural Steel Co. v. Spannus*, 438 U.S. 234 (1978) (quoted in Petition at 13-14), in which this Court found a substantial impairment in Minnesota's abortive attempt to "enter[ ] a field it had

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Ann., tit. 24-A, § 2744) (extending coverage for social workers and psychiatric nurses); Me. Laws 1985, ch. 516, § 3 (codified at Me. Rev. Stat. Ann., tit. 24-A, § 2748) (extending coverage for chiropractors); Me. Laws 1989, ch. 176, § 5 (codified at Me. Rev. Stat. Ann., tit. 24-A, § 2750) (extending coverage for AIDS); Me. Laws 1991, ch. 156, § 1 (codified at Me. Rev. Stat. Ann., tit. 24-A, § 2745-A) (extending coverage for mammograms); *see also* Petition at 20 n.8 (noting "substantial amend[ment]" to Maine Insurance Code in 1993); *see generally* Me. Laws 1993, ch. 477 (major revision to Maine Insurance Code).

never sought to regulate[.]" 438 U.S. at 249. In short, American Republic entered into a contract in a heavily regulated industry, and thus cannot claim that the shifting sands of such regulation constituted a substantial impairment of that contract.

There is another reason why the alleged impairment is not substantial. As noted above, American Republic could have sought a rate increase to offset the alleged increased costs, which, under state law, must be approved unless they are "excessive, inadequate or unfairly discriminatory" or otherwise violate state law. Me. Rev. Stat. Ann., tit. 24-A, § 2736. American Republic did not seek such a rate increase for nearly two years after the challenged statute went into effect, and then ignored the offer of a partial rate increase. Indeed, American Republic did not seek an adjudicatory hearing or court review of its requested rate increase, but simply abandoned its request altogether. American Republic has only its own lassitude to blame for the allegedly unique and severe impact of the challenged statute on its guaranteed renewable contracts. In sum, although the Maine Supreme Judicial Court was prepared to assume that the alleged impairment was substantial, this Court need not – and should not – make that assumption.

C. The Challenged Statute Is Justified By A Significant And Legitimate Public Purpose.

Assuming that the alleged impairment is substantial and not self-inflicted, "the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and

general social or economic problem." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. at 411-12 (citations omitted). Once again, the Maine Supreme Judicial Court expressly applied this legal standard to the particular facts of this case.

Although American Republic dismisses the Maine Supreme Judicial Court's "superficial consideration" of the statute's public purpose, *see* Petition at 16, the court's conclusions were succinct because they were self-evident:

> We look to plain language of the statute to discern the real purpose of the legislation, which in this case reveals an intent to improve access to adequate health care. Such a public purpose cannot be considered other than significant and legitimate, *see Calfarm Insurance Co. v. Deukmejian*, [48 Cal.3d 805, 258 Cal.Rptr. 161,] 771 P.2d 1247, 1250, 1262-63 (1987). The Legislature has determined that requiring coverage for preexisting conditions will reduce the number of persons without coverage and increase the availability of medical treatment.

App. 5-6 (other citations omitted). Since American Republic appears to concede that persons with preexisting coverage exclusions could not obtain coverage for such conditions at any price, *see* Petition at 20 n.8, it cannot be seriously challenged that the Maine Legislature could properly conclude that section 2850(2) would provide increased health insurance coverage for persons with preexisting medical conditions.

In fact, not even American Republic questions "whether the legislation as a whole serves a broad public purpose[.]" *See* Petition at 15. Rather, American Republic

atomizes the challenged statute by questioning only whether the "retroactive application" of the statute serves a broad and public purpose. *Id.* This is the wrong answer to the wrong question.[2]

Section 2850(2) prohibits preexisting condition exclusions for more than 24 months for all individual health insurance policies. The statute certainly was not directed at American Republic, and was not, by its terms, even "retroactive." Instead, it was only due to the "unique" terms of its individual health insurance policies that American Republic became obligated under the statute to provide additional coverage following renewal of its guaranteed renewable insurance policies.

In short, the challenged statute had only an incidental effect on American Republic. Because the challenged statute "imposed a generally applicable rule of conduct, it

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[2] In making this argument, moreover, American Republic purports to rely upon what it describes as a concession by the Superintendent in the Maine Superior Court (Petition at 16). American Republic has quoted the Superintendent's argument out of context. The relevant passage reads as follows:

> In the State of Maine, the Legislature has enunciated the strong public policy that the loss sharing functions of insurance must be used to extend coverage to those who need it most. Perhaps American Republic is correct that the particular law that was enacted actually retards rather than advances that purpose, [citation omitted], but that is a political matter, not a constitutional matter, as long as "the premiums chargeable can be commensurate with the greater risks of the new business."

Superior Court Brief of the Superintendent at 12, quoting *California Automobile Association v. Mahoney*, 341 U.S. 105, 108 (1951).

is sharply distinguishable from measures struck down" previously by this Court (and relied upon by American Republic in its petition). *Exxon Corp. v. Eagerton*, 462 U.S. at 192; *see* Petition at 16. In *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977), the challenged statutes' "sole effect was to repeal a covenant that the two States had entered into with the holders of bonds issued by the Port Authority of New York and New Jersey," and "also implicated the special concerns associated with a State's impairment of its own contracts." *Exxon Corp. v. Eagerton*, 462 U.S. at 192 & n.13 (citations omitted). In *Allied Structural Steel Co. v. Spannus*, 438 U.S. 234 (1978), the challenged statute had an "extremely narrow focus" and indeed may have been "aimed at a single employer." *Id.* at 248 (quoted in Petition at 16).

In short, "[t]he requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. at 412 (footnote omitted). Since American Republic does not suggest otherwise, that is the end of the matter.

D. The Adjustment Of The Petitioner's Rights And Responsibilities Is Reasonable And Appropriate Based On The Challenged Statute's Public Purpose.

"Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of 'the rights and responsibilities of the contracting parties [is based] upon reasonable conditions and [is] of a character

appropriate to the public purpose justifying [the legislation's] adoption.' " *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. at 412 (brackets in original and quoting *United States Trust Co. of New York v. New Jersey*, 431 U.S. at 22). Once again, the Maine Supreme Judicial Court expressly considered and applied this standard, finding that section 2850(2) "allows insurers to exclude preexisting conditions for limited periods and * * * does not prohibit them from charging higher premiums to recover any losses." App. 6 (citation omitted).

American Republic's primary complaint here is that the Maine Supreme Judicial Court's "excessively deferential attitude" conflicts with this Court's precedents. *See* Petition at 18. American Republic is mistaken. "We have repeatedly held that unless the State itself is a contracting party, courts should properly defer to the legislative judgment as to the necessity and reasonableness of a particular measure." *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. at 505 (quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. at 412-13, and *United States Trust Co. of New York v. New Jersey*, 431 U.S. at 22). Although American Republic disputes the Maine Court's conclusions, first, that insurers could exclude preexisting conditions for limited periods, second, that insurers could charge higher premiums to recover any losses, and, third, that the challenged statute would improve access to medical coverage for persons with preexisting medical conditions, *see* App. 6 (opinion below); Petition at 18-19, the court's deference is entirely justified in this case.

The challenged statute expressly permitted insurers to exclude preexisting conditions for between six and 24

months following issuance or renewal of individual health insurance policies, *see* Me. Rev. Stat. Ann., tit. 24-A, § 2850(2), and it bears repeating that American Republic could have sought, but did not seek, an offsetting rate increase. *See* Me. Rev. Stat. Ann., tit. 24-A, § 2736. Contrary to American Republic's claims in this Court, *see* Petition at 18-19, the Superintendent expressly found that American Republic properly continued to exclude preexisting conditions for its guaranteed renewable policy issued to Herbert Wentworth for seven months after the effective date of the challenged statute, App. 19-20, and that American Republic was solely responsible for its failure to seek a rate increase that coincided with the phase out of the preexisting condition exclusions. App. 23.

Because American Republic abandoned its requested rate increase, its assertion that rate increases would actually reduce access to adequate medical care, *see* Petition at 20, is, at best, speculative. Indeed, given American Republic's apparent concession that individuals such as Wentworth could not obtain coverage for preexisting conditions at any price, *see* Petition at 20 n.8, American Republic's assertion that rate increases would actually reduce access to adequate medical care is, in fact, probably untrue. In sum, because the Maine Supreme Judicial Court properly rejected on both factual and legal grounds American Republic's contract clause claim, this Court should not expend its limited resources to review American Republic's necessarily narrow claim that the Maine Supreme Judicial Court properly cited, but simply "misapplie[d]" the legal standard articulated in *Energy Resources Group* to the particular facts of this case.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

February 23, 1995

Respectfully submitted,

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